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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA  
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7 UNION PACIFIC RAILROAD COMPANY,  
8 a Delaware corporation,

Case No. 3:17-cv-00477-LRH-CLB

Plaintiff,

ORDER

9 v.

10 WINECUP RANCH, LLC, an Idaho Limited  
11 Liability Company; and WINECUP  
12 GAMBLE, INC., a Nevada corporation; and  
13 PAUL FIREMAN, an individual,

Defendants.  
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15 Before the Court is the issue of how to calculate damages should Union Pacific Railroad  
16 Company (“Union Pacific”) prevail at the upcoming trial. Winecup Gamble, Inc. (“Winecup”) intends to have its expert Derek Godwin testify on the cost of rebuilding the earthen embankments  
17 and culvert structures washed out during the at-issue flood event. ECF No. 160. Winecup’s  
18 position is that even if it is liable for Union Pacific’s damages, it should be held responsible for  
19 only the cost to rebuild these structures less depreciation. Union Pacific did not rebuild the earthen  
20 embankment and culvert structures at certain locations but chose instead to build steel bridges.  
21 Union Pacific contends that, should it prevail, Winecup should be responsible for the increased  
22 cost associated with building these bridges, not just the cost of replacing the earthen embankments  
23 and culverts. Because Union Pacific argued its position on calculating damages for the first time  
24 in a reply to one of its own motions in limine, the Court permitted Winecup to file a sur-reply so  
25 that both sides had a full and fair opportunity to articulate their respective positions. *See* ECF Nos.  
26 198 & 199. Having reviewed the parties’ arguments, the record in this case, and the relevant case  
27 law, the Court finds that should Union Pacific prevail, the proper measure of damages will be the  
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1 cost of restoration, i.e., the cost to repair the washed-out sections of track and restore the property  
2 to its *former* condition, less depreciation.

### 3 **I. BACKGROUND**

4 Union Pacific owns railroad track that runs through twenty-three western states, a portion  
5 of which runs east/west across the Utah/Nevada state line and through Elko County, Nevada. ECF  
6 No. 89 at 1–2. Winecup owned and managed the Dake Reservoir dam (ID #NV00109, legal  
7 description 189DN40 E70 07D) and 23 Mile dam (ID #NV00110, legal description  
8 189CN42 E67 15BA),<sup>1</sup> both located in Elko County, Nevada. *Id.* at 2. On or about February 8,  
9 2017, the 23 Mile Dam overtopped and breached in two locations which, Union Pacific alleges,  
10 caused water to flow downstream into the Dake Reservoir. *Id.* at 5. The water influx into the Dake  
11 Reservoir caused the dam to erode and ultimately breach which led to flooding. *Id.* at 5–6. As a  
12 result of the flooding, portions of earthen embankments which supported Union Pacific railroads  
13 were washed out, leaving the railways inoperable and suspended in the air. *Id.* at 6. As a result of  
14 the damage, Union Pacific chose to replace the washed-out earthen embankments with new steel  
15 bridges to make the railways operable again.<sup>2</sup> ECF No. 160 at 6–7. Union Pacific reported its total  
16 cost to repair the four washouts was \$18.5 million.<sup>3</sup> ECF No. 139 at 9. An expert witness for  
17 Winecup, Derek Godwin, calculated that the earthen embankments could have been rebuilt for  
18 \$4.28 million. ECF No. 160 at 7.

19 Union Pacific’s amended complaint alleges negligence, negligence per se, trespass and  
20 nuisance. ECF No. 89 at 6–12. Union Pacific filed its fifth and sixth motions in limine to bar two  
21 opinions of Winecup’s expert Derek Godwin. ECF No. 139. In its response to the two motions,  
22 Winecup argued that “Union Pacific can only recover the cost to rebuild the embankments  
23 structures that previously existed,” not the cost of the new steel bridges Union Pacific chose to

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25 <sup>1</sup> The record indicates that this dam is also known as Twenty One Mile Dam or 21 Mile Dam. *See* ECF No. 154-2 at 5.

26 <sup>2</sup> The record indicates that only three of the four earthen embankments destroyed by the flood were replaced  
27 with new steel bridges; the fourth was replaced with a new earthen embankment. *See* ECF No. 199 at 6 n1.

28 <sup>3</sup> Union Pacific claims approximately \$13 million in damages for building three steel bridges. ECF No. 199 at 6 n.1.

1 build as replacements. ECF No 160 at 7. In its reply, Union Pacific argued that it “is not limited to  
2 the costs to replace the exact structures that existed before the flood.” ECF No. 178 at 10.

3 In the Court’s view, Winecup had not had a full and fair opportunity to respond to Union  
4 Pacific’s damage calculation arguments; it therefore ordered Winecup to file a sur-reply, which  
5 was timely filed. ECF No. 199. In its sur-reply, Winecup argued that “the law does not allow Union  
6 Pacific to improve the condition of its property by building steel bridges and [receive]  
7 reimbursement for the cost of the upgrade[.]” ECF No. 199 at 6. The Court’s order now follows.

## 8 **II. DISCUSSION**

9 The purpose of damage awards in tort is “to compensate plaintiffs for losses incurred,” and  
10 as far as money can do, place the plaintiff in the same, or as near as possible, to the position that  
11 they would have occupied if the wrong had not occurred. *Felder v. United States*, 543 F.2d 657,  
12 667 (9th Cir. 1976) (quoting C. McCormick, LAW OF DAMAGES § 137 at 560 (1935)); *Am. Access*  
13 *Cas. Co. v. Cruz*, No. CV16-0173, 2018 Nev. Dist. LEXIS 362, at \*48 (Feb. 14, 2018) (citing  
14 Ronald Eades, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS § 1.01 (5th ed., Mathew  
15 Bender 2012)). For damages to land that do not amount to total destruction of value, the Second  
16 Restatement of Torts provides that a plaintiff is entitled to (1) either the cost of restoration or “the  
17 difference between the value of the land before the harm and the value after the harm;” (2) “the  
18 loss of use of the land;” and (3) “discomfort and annoyance to [the plaintiff] as an occupant.”  
19 RESTATEMENT (SECOND) OF TORTS § 929 (1979). If the damage occurred to something attached to  
20 the land, but severable, the plaintiff may elect to recover “the loss in value to the thing instead of  
21 the damage to the land as a whole.” *Id.*

22 The law of Nevada generally follows the Second Restatement: “[W]hen an injury is done  
23 to property, the cost of restoring the property to its condition before the injury would be the proper  
24 measure of damages, unless there is total destruction of the property or the cost of restoration  
25 exceeds the value of the property.” *Wells Enters. v. Wells Bloomfield, LLC*, 989 F. Supp. 2d 1055,  
26 1059 (D. Nev. 2013). The cost of restoration may be calculated in one of three ways: (1) “the cost  
27 of repairs which would be necessary to restore the [property] to its former condition less  
28 depreciation,” *Richfield Oil Corp. v. Harbor Ins. Co.*, 452 P.2d 462, 467 (Nev.1969); (2) the cost

1 of replacing the property less depreciation, see *Harvey v. Sides Silver Mining Co.*, 1 Nev. 539, 543  
 2 (1865),<sup>4</sup> or (3) “the actual value of the property at the time and place it was destroyed,” *Witt v.*  
 3 *Nev. Cent. R. Co.*, 44 P. 423, 428 (Nev. 1896). However, the plaintiff is “not entitled to receive an  
 4 amount greater than the value of the property destroyed by the trespasses of the defendant.” *Waters*  
 5 *v. Stevenson*, 13 Nev. 157, 173 (1878) (discussing *Harvey*, 1 Nev. 539)). And the plaintiff should  
 6 not be placed in a better position than they would have been had the wrong not occurred. *Valdez*  
 7 *v. Taylor Auto Co.*, 278 P.2d 91, 98 (Cal. Ct. App. 1954).

8 Pursuant to Nevada law, should Union Pacific prevail in this case, the proper measure of  
 9 damages will be the cost of restoration, i.e., the cost to repair the washed-out sections of track and  
 10 restore the property to its former condition, less depreciation. The jury will decide the total cost of  
 11 damages appropriate given this calculation.

### 12 **III. CONCLUSION**

13 IT IS THEREFORE ORDERED that, should Union Pacific prevail, the proper measure of  
 14 damages will be the cost of restoration, i.e., the cost to repair the washed-out sections of track and  
 15 restore the property to its former condition, less depreciation.

16 IT IS SO ORDERED.

17 DATED this 19th day of January, 2022.

  
 18 LARRY R. HICKS  
 19 UNITED STATES DISTRICT JUDGE  
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 27 <sup>4</sup> The Nevada Supreme Court further reasoned: “Where an injury is done to a building, . . . the cost of  
 28 putting it in as good condition as it was before the injury would be the proper measure of damage, for in  
 most cases of the kind such cost would in fact, be the actual damage suffered by the complainant, though  
 where there was total destruction of a building it was held that the value of the building, and not the cost of  
 rebuilding it, was the proper measure of damage.” *Harvey*, 1 Nev. at 542.